IPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 60

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Respondent,

vs.

DICK GREGORY, ET AL.,
Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT.

RESPONDENT'S BRIEF IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO [redacted] 56

INDEX.

	PAGE
Opinion Below	1
Question Presented	1
Statement	2
Reasons for Denying the Writ	4
I. Freedom of speech is not unqualified, it has allowable limits	4
II. The defendants were guilty of violating the Municipal Ordinance	7
III. The instruction given on the lack of a parade permit was harmless and did not deprive the defendants of any rights guaranteed under the Constitution	9
Wolin v. Port of New York distinguished	9
Conclusion	10

CITATIONS.

Cases.

Feiner v. New York, 340 U. S. 315, 319, 321 (1951)	6
Cox v. Louisiana, 379 U. S. 536, 551 (1965)	4, 6
People v. Turner, 265 N. Y. S. 2d 841, 850-851, 853 (1965), *aff'd*, 17 N. Y. 2d 829, writ of certiorari dismissed as improvidently granted Sup. Ct. of U. S., Turner v. New York, 386 U. S. 773 (1967)	4
Adderley v. Florida, 385 U. S. 39 (1966)	4, 7
Watson v. City of Memphis, 373 U. S. 526, 535	5
Niemotko v. Maryland, 340 U. S. 268, 282 (1950)	6

STATEMENT.

The Statement on pages 4-7 of the Petition is biased and it omits important facts. The following is supplied as a supplement to the petitioners' statement.*

When the marchers formed at Buckingham Fountain, the defendant, Gregory, addressed them and said they would march to "Snake Daley's house—the Snake Pit", and that "they would continue to keep going there until he [Daley] fired Ben Willis" (Rec. 218).

The police were assigned to *protect* the marchers (Appendix to Petition, p. 3a). To protect the marchers the police kept spectators across the street from them and ordered taverns closed during the march (Appendix of Petition, p. 5a). Gregory himself testified to instances where the police kept the crowd that was gathering from interfering with the march (Appendix of Petition, p. 6a; Rec. 623, 630, 632, 652).

Enroute to the house of Mayor Daley and while marching around the block where the Mayor's home is located, the defendants chanted: "Ben Willis must go, Snake Daley, also" (Rec. 107); "Ben Willis must go—When?—Now!—Ben Willis must go and Snake Daley also" (Rec. 266-267); "Ben Willis must go—hey, hey, what do you know, Daley must go"; "We are going to the home of the Snake, the Snake Pit is down the street" (Rec. 538-539). The marchers were accompanied by their attorney (Appendix to Petition, p. 4a).

The crowd increased to at least 1000 or 1200 in number and it became an unruly mob (Rec. 108, 115, 277, 299). There was testimony that there were 1200 people on 35th Street and a similar number on 36th Street (Rec. 527).

* The facts herein are summarized from the Record and from the facts as found by the Supreme Court of Illinois in its decision.

The police protecting the marchers were dodging missiles and eggs thrown from the midst of the crowd (Rec. 403, 478, 495, 507, 524). The police commander instructed the officers to apprehend the missile throwers but due to the crowd size and the commotion they were unable to do so (Rec. 117, 507). In addition to throwing missiles, the crowd engaged in invective and made threats "to get" the marchers (Rec. 277, 283, 292). The police were constantly blocking and pushing back spectators who attempted to approach the marchers (Rec. 277, 278, 298). About 9:20 o'clock p.m. the people seemed to come from everywhere and the crowd became uncontrollable (Appendix of Petition, p. 6a; Rec. 300, 524).

About 9:30 o'clock p.m. the commander told Gregory that the situation was increasingly dangerous and becoming riotous. He requested Gregory about five times to cooperate by leading the marchers out of the area under police protection (Appendix of Petition, p. 7a; Rec. 551, 568). Gregory responded to the request of the commander by telling the marchers, "We are not going to leave. We will remain here. Let them arrest us" (Rec. 118, 407). Then the police commander advised the marchers they would be arrested if they still persisted. Three marchers voluntarily left under police protection, and those remaining were arrested (Appendix of Petition, p. 7a; Rec. 119-120).

During the trial an attorney for the marchers admitted to the jury that the evidence would show that a dangerous condition existed (Rec. 90).

The jury found the defendants guilty of disorderly conduct, judgment was entered on the verdict and five defendants were assessed fines of $200.00 each and 35 defendants were assessed fines of $25.00. The Supreme Court of Illinois affirmed the judgments.

REASONS FOR DENYING THE WRIT.

ARGUMENT.

For the following reasons, a writ of certiorari should not issue to review the decision of the Supreme Court of Illinois.

I.

Freedom of speech is not unqualified, it has allowable limits.

The record in the instant case establishes that the defendants were not prevented from expressing their viewpoints. Indeed, the facts show, and the Supreme Court of Illinois found, that not only were the police assigned to *protect* the demonstrators but that they performed the assignment in a highly professional manner. During the approximate five and one-half hours and many miles of the march, the police attended the demonstrators and protected them at all times. The police closed the taverns in the neighborhood; they kept the hostile spectators segregated from the pickets; they forced people to go into their homes and close their doors; they prevented spectators from blocking the line of march and from approaching the marchers; and finally, the police themselves received the main brunt of the eggs, rocks and missiles thrown at the pickets.

This Court has crystallized the rule, both in opinions rendered and by denying writs of certiorari, that First Amendment rights are not absolute at all times and under all circumstances. *Adderley* v. *Florida*, 385 U. S. 39 (1966); *Cox* v. *Louisiana*, 379 U. S. 536 (1965). In *People* v. *Turner*, 265 N. Y. S. 2d 841 (1965), *aff'd*, 17 N. Y. 2d 829 (1966),

where on May 8, 1967, the Supreme Court of the United States dismissed the writ of certiorari as improvidently granted (*Turner* v. *New York*, 386 U. S. 773 (1967)), the defendants were convicted of disorderly conduct when they refused several warnings to cease a street meeting protesting the Viet Nam war and where their protests were inciting the spectators. The Supreme Court of New York, Appellate Term, *People* v. *Turner*, 265 N. Y. S. 2d 841 said (pp. 850-851):

> "All these defendants clearly acted 'in such a manner as to annoy, disturb, interfere with, obstruct or be offensive to others.'
>
> "* * * There were no arrests made before the defendants conducted themselves in the manner set forth above and not before all of them were repeatedly warned to desist * * *."

The court continued (p. 853):

> "Our state courts have upheld *reasonable* action of the police in seeking to disperse street meetings in areas where a breach of the peace or possibility of disorder may arise—* * *." (Emphasis by Court.)

In the case at bar, as in *Turner*, there were no arrests made until the defendants had refused repeated requests to desist. The writ here should likewise be denied.

The decisions of this Court and of other courts of review have defined and fixed the rationale to be applied in cases where protesters assert deprivation of free speech. The reasoning is that neither the police nor statutes and ordinances may be used to suppress views simply because of hostility to their assertion or exercise (*Cox* v. *Louisiana*, 379 U. S. 536, 551; *Watson* v. *City of Memphis*, 373 U. S. 526, 535). In the instant case, the expression of the pickets was not suppressed. To the contrary, the defendants were carefully protected and defended which enabled them to express as much free speech as possible. In Municipal

Regulation of Free Speech, Illinois Law Review, Vol. 46, the writer states (p. 496):

> "The only reasonable answer must be based on the assumption that implicitly the Court has adopted a pragmatic approach in this area. It wants to permit as much free speech as possible; at the same time it does not want normal life to be reduced to chaos as a result of the exercise of First Amendment rights".

The foregoing statement is supported by many decisions of the Supreme Court of the United States. In *Niemotko* v. *Maryland*, 340 U. S. 268 (1950), Justice Frankfurter, in a concurring opinion, stated (p. 282):

> "The results in these multifarious cases have been expressed in language looking in two directions. While the Court has emphasized the importance of 'free speech,' it has recognized that 'free speech' is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if interference with free expression of ideas is not found to be the overbalancing consideration."

In *Cox* v. *Louisiana*, 379 U. S. 536 (1965), both the majority opinion and the dissenting opinion of Justice Black contain language applicable to the instant case. Both opinions declare that the right to peaceful protest does not mean it can be engaged in at anytime or anyplace and that even the most peaceful protester has a plain duty and responsibility to obey the laws; and that it does not take away the State's duty and responsibility to maintain order.

In *Feiner* v. *New York*, 340 U. S. 315 (1951), this Court stated (p. 319):

> "Petitioner was thus neither arrested nor convicted for the making or content of his speech. Rather it was the reaction which it actually engendered."

This Court continued (p. 321):

> "It is one thing to say that the police cannot be used

> as an instrument for the suppression of unpopular views, and another to say that, when as here a speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace."

Clearly, the mere presence of the instant defendants was unpopular with the people living in the residential neighborhood they invaded, and the invective and insulting language directed at one resident, the Mayor of Chicago, incited his neighbors even further. Nevertheless, the police protected the pickets and protected their expressions of unpopular views for approximately two hours. Only when an uncontrollable riot became imminent did the police first explain the situation to the marchers and request them to leave. It was impossible to arrest the huge riotous crowd of spectators. Only when the marchers refused to comply with the order of the police to move on because of the situation were they arrested.

II.

The defendants were guilty of violating the Municipal Ordinance.

The Supreme Court of Illinois held that the ordinance of the City of Chicago authorized the action taken by the police under the circumstances disclosed by this record (Appendix to Petition, p. 15a). The reviewing courts of Illinois had previously ruled in numerous cases that the ordinance was valid (*City of Chicago* v. *Williams*, 45 Ill. App. 2d 327 (1963); *City of Chicago and People* v. *Lambert*, 47 Ill. App. 2d 151). In *Adderley* v. *State of Florida*, 385 U. S. 39 (1966), this Court held that the definition of the offense by the state court is binding on the Supreme Court of the United States. Likewise, in *Edwards* v. *South Carolina*, 372 U. S. 229 (1963), this Court declared (p. 235):

> "The state courts have held that the petitioners' conduct constituted breach of the peace under state law, and we may accept their decision as binding upon us to that extent."

In *Terminiello* v. *Chicago,* 337 U. S. 1 (1949), cited in the Petition, p. 9, this Court said (p. 6) that "the pinch of the statute is in its application. It is that question which the petitioner has brought here." It is precisely the utter difference in facts, and, hence application of the ordinance, which establishes the inapplicability of the decision in *Terminiello* to the instant case. In *Terminiello,* the protester hired a hall and there gave vent to a speech loaded with invective and insult which caused the audience to threaten to riot—the audience had voluntarily attended, or invaded, the hall. In the instant case the protesters, defendants here, had invaded the neighborhood of the crowd which became riotous. Furthermore, the defendants were accompanied by their own attorney, and, in addition, the defendants were fully aware that their refusal to cooperate with the police warranted their arrest since it was their leader, Gregory, who said, "We are not going to leave. We will remain here. Let them arrest us" (Rec. 118, 407). It was only after this refusal that the police stated they would arrest the defendants. Thus, it is evident that the defendants were aware of the sanctions they would suffer if they persisted in their activities. They had adequate warning that their conduct was prohibited (*United States* v. *Petrillo,* 332 U. S. 1 (1947).

In an unrelated case a Judge of the United States District Court, Northern District of Illinois, Eastern Division, No. 67 C 1863, entered an order holding the ordinance invalid. Notice of Appeal has been filed by the City of Chicago from this order. The ordinance under which petitioners were fined has been superseded by an amendment to the Municipal Code of Chicago the effect of which is to obviate any

future charges being processed under the former ordinance and to that extent, at least, the question of the validity of the former ordinance has become moot.

III.

The instruction given on the lack of a parade permit was harmless and did not deprive the defendants of any rights guaranteed under the Constitution.

The Supreme Court of Illinois ruled that the instruction given to the jury relating to the ordinance requiring a parade permit did not mislead the jury or prejudice the defendants (Appendix to Petition, p. 16a). The reviewing courts of Illinois have repeatedly ruled that a verdict of a jury cannot be disturbed in the absence of a determination on the part of the reviewing court that the verdict is against the manifest weight of the evidence. *Loucks* v. *Pierce,* 341 Ill. App. 253 (1950). The object of review is to determine whether the record is free of error prejudicial to the party's rights and that if upon the facts it is a reasonable assumption that no different verdict would be reached on another trial, and, that if the judgment rendered is the only one consistent with the evidence and law in the case, an error in instruction is not reversible error. *Kosowski* v. *McDonald Elevator,* 33 Ill. App. 2d 386, 396-397 (1962).

In the instant case the petitioners were found guilty only of violating the ordinance relating to disorderly conduct and on review the Supreme Court of Illinois held that the record sustained the judgment of the trial court.

Wolin v. *Port of New York Authority* Distinguished.

The petitioners included in the "Conclusion" to the Petition a quotation from *Wolin* v. *Port of New York Authority,* ..... F. 2d ..... (2d Cir., March 1, 1968), 36 U. S. Law Week 2550, 2551 (Petition, p. 12). That decision is cited out of

context and without reference to the facts involved herein. Wolin attempted to set up a table in the terminal to pass out literature, display placards and engage in conversation with others in order to publicize his viewpoint on public issues. The question considered by the Court was whether the terminal officials could refuse to permit Wolin's activities based on a statute which bars miscreants and disorderly persons from the terminal. The Court stated that it was beyond dispute that the congestion and controversy that may attend the activity in the terminal, while pertinent to the enactment of rules and regulations to govern the activity, could not be invoked to support a flat prohibition.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 13, 1968.